APPENDIX A

(OPINION OF THE COURT BELOW)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,866

AMERICAN UNION TRANSPORT, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD,

Respondents,

RIVER PLATE AND BRAZIL CONFERENCES, *et al.*,

Intervenors.

On Petition to Review Order of the Federal Maritime Board

Decided April 24, 1958

Mr. GEORGE F. GALLAND, with whom Mr. WILLIAM J. LIPPMAN was on the brief, for petitioner.

Mr. EDWARD APTAKER, Chief, Regulations Branch, Federal Maritime Board, with whom Messrs. ROBERT E. MITCHELL, Assistant General Counsel, Federal Maritime Board, and DANIEL M. FRIEDMAN, Attorney, Department of Justice, were on the brief, for respondents.

Mr. ELMER C. MADDY, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of

Court, with whom Mr. Robert E. Kline was on the brief, for intervenors. Mr. Ronald A. Capone also entered an appearance for intervenors.

Before Danaher, Bastian and Burger, Circuit Judges.

Bastian, *Circuit Judge*: This is a proceeding to review an order of the Federal Maritime Board (hereinafter referred to as the Board). The order under review denied petitioner reparations for an alleged violation of § 15 of the Shipping Act of 1916.[1]

Petitioner, American Union Transport, Inc. (hereinafter referred to as AUT), is a registered freight forwarder, broker, owner and charterer of vessels, and a water carrier. River Plate and Brazil Conferences (hereinafter referred to as the Conference) is a group of steamship lines, common carriers by water between certain ports of the United States and Canada and ports in South America, including Brazil. The Conference operates pursuant to a certain agreement on file with and approved by the Board, and certain parts of that agreement, important to a consideration of this case, will be hereinafter referred to. The agreement gives the Conference power to make rates, including brokerage,[2]

[1] The provisions of §§ 15 and 16 of the Shipping Act of 1916 are attached hereto as an appendix. [See Appendix C.]

[2] The brokerage may be paid by Conference members in accordance with the following rules adopted pursuant to the basic agreements:

> "Rule 10 of the Conference Tariff No. 11: *Brokerage*. Freight brokerage not to exceed 1¼% of the amount of freight may be allowed only to bona fide brokers whose actual business shall be brokerage and freight between ocean carriers and general shipping public; a broker whose business is maintained directly or indirectly by a shipper or consignee for the purpose of handling his business exclusively shall not be deemed a bona fide broker; freight brokerage

subject to approval of the Board. AUT is not a member of the Conference.

Sometime in 1952 the Estrado de Ferro Central do Brazil (hereinafter called Central), an instrumentality of the Government of Brazil, purchased 120 locomotives and certain parts from American and Canadian companies. The Conference interested itself in obtaining carriage of these locomotives on Conference vessels, as did AUT. AUT's quotation was the high one and it did not get the business as a carrier, but the Conference did. Thereafter, on May 16, 1952, AUT was advised by Central that the ocean transport of the locomotives had been entrusted to Lloyd Brasileiro (hereinafter referred to as Lloyd), a steamship line member of the Conference and, like Central, an instrumentality of the Brazilian Government, and at the prices quoted by the Conference. Central's letter to AUT also contained the following language:

> "Likewise it was decided to appoint American Union Transport, Inc. as brokers in charge of negotiations and arrangements in connection with these shipments by Lloyd Brasileiro or another member of the Conference, without any charge to Central.
>
> "I already advised Lloyd Brasileiro of this appointment in my letter of May 14th and am today sending correspondence to the same effect to the manufacturers General Electric, Baldwin-Lima-Hamilton Corporation and Montreal Locomotive Works Ltd.

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shall be paid only on the following understanding which shall be written or stamped on all brokerage bills:

> "'In compliance with Section 16 of the Shipping Act, 1916, payment by the carrier and the acceptance of freight brokerage by the broker are on the strict understanding that no part of the brokerage shall revert to the shipper or consignee, and that the business of the broker is in no sense subsidiary to that of the shipper or consignee.'
>
> "NOTE: At Canadian Ports 'In compliance with Section 16 of the Shipping Act, 1916' shall be deleted."

Opinion of the Court Below

> "The Central will undertake to sign the freight contract directly with Lloyd Brasileiro, but would request your cooperation in drawing up the essential clauses in contracts of that nature."

Central also notified at least one of the Conference lines of the designation.

On June 11, 1952, AUT notified Lloyd that the first two locomotives would be ready on a date specified, and advised Lloyd that brokerage will be due us at the rate of 1¼% of the freight." Upon receipt of this letter Lloyd advised AUT that the claimed brokerage would not be paid for the reason that both Central and Lloyd were departments of the Government of Brazil and were not permitted to pay brokerage on shipments consigned to Brazilian Government departments.

On June 11, 1952, the Chairman of the Conference called a special joint executive meeting thereof to be held on June 12 to determine whether or not brokerage should be paid to AUT, and this notice contained, among others, the following statement:

> "In view of the fact that the American Union Transport Company and or its associates negotiated for these locomotives as a competitor carrier, underquoting existing Conference rates, forcing the Conference to markedly reduce its rates to secure this business, it is believed by several lines that even though they have been appointed freight forwarders by the Central Railroad of Brazil, they are performing no service whatsoever for our member lines and therefore are not entitled to brokerage."

The minutes of this specially called meeting show that the following action was taken:

> "After discussion it was proposed that no brokerage be paid on the 120 Locomotives closed direct in Brazil with the Central Railroad of Brazil by Con-

ference representatives, and on ballot vote the proposal was approved.

"On motion, seconded and carried, meeting thereupon adjourned."

AUT continued to render services as a freight forwarder, that is, handling bills of lading, and did other acts usually performed by a freight forwarder rather than by a broker. AUT claims that it was not advised of the Conference action until October 1952,[3] when its bills to Moore-McCormack Lines were returned to AUT unpaid, with the explanation that the line could not pay due to the Conference action of June 12, 1952. However, the witness Holzer, representing AUT, testified that his company learned of the Conference action shortly after it took place, some time in June 1952. Holzer also testified:

"Q. So you were under no illusion that members of the Conference could not pay you brokerage on these locomotives under the Conference action?

"A. We felt that this action was completely unjustified, and we notified the lines that we would not accept the denial of brokerage.

"Q. But you went ahead and acted, knowing the Conference had taken this action?

"A. Certainly, we had undertaken to handle this business entrusted to us by a very important client, namely, Estrada, and even though perhaps the Conference wanted us to drop it, we couldn't do that

[3] AUT was advised by Lloyd, which carried the great bulk of the freight, on June 12, 1952, that the so-called brokerage attempted to be charged would not be paid by Lloyd on any shipments since this would mean that the Brazilian Government would be paying brokerage on shipments "they would normally handle as they have been handled in the past." There is no evidence justifying the claim that Lloyd as a matter of fact took this action as a result of the June 12, 1952 meeting. In fact the evidence is to the contrary.

because they saw fit not to pay us brokerage. But we went on record that we would demand it.

"Q. So you went ahead with this business because you felt you had an obligation to the Central Railroad who had appointed you?

"A. Yes, we had an obligation. We had undertaken to handle these 120 locomotives."

Section 15 of the Shipping Act is in fact the antitrust law for the shipping industry and no action taken by the Conference which in any way savors of what would be a violation of the Sherman Antitrust Act is proper. However, certain actions may be taken in concert by members of the Conference, if approved by the Board.

The agreement of June 12, 1952, was never filed with the Board for approval (although the minutes of the meeting were filed with the Board); and the claim of AUT is that it was therefore an invalid and unlawful agreement and in violation of § 15.

In 1954, before the present proceedings were instituted, a federal antitrust suit was filed by AUT in the United States District Court for the Southern District of New York on the ground that the action taken by the Conference on June 12, 1952, was a violation of the Sherman Act. The Conference and its member lines, and the Board, moved to dismiss this antitrust suit on the ground that the claim was within the exclusive jurisdiction of the Board. The motions to dismiss were granted on the ground stated and the complaint dismissed. On appeal to the Circuit Court of Appeals for the Second Circuit, this decision was affirmed. *American Union Transport v. River Plate and Brazil Conferences*, 222 F. 2d 369 (2d Cir. 1955).

On June 14, 1954, under § 22 of the Shipping Act, proceedings were instituted before the Board by AUT asking that the Conference agreement of June 12, 1952, be declared unlawful because it was neither filed with

nor approved by the Board, and asking reparations in the amount of $11,647.11, being the amount of the brokerage allegedly denied AUT as a result of the June 12, 1952, action. In answer the Conference contended, among other things, that § 15 of the Act had not been violated;[4] that brokerage was not in fact earned; that, as AUT had performed no service for the Conference, and had competed with the Conference for the business, it was obvious that it was not entitled to brokerage from a member of the Conference; and, further, that the Board had no jurisdiction over shipments from Canada.

The matter was referred to an examiner, who in due course held the charges to be sustained, and recommended reparations or damages in the amount of $7,330.41, being the amount which would have been due under the 1¼% brokerage formula approved in the Conference agreement[5] insofar as shipments moving from American ports were concerned, but denied reparations insofar as shipments from Canadian ports were concerned. The examiner also recommended that the fact of the violation of § 15 of the Act "be certified to the Department of Justice for institution of appropriate proceedings."

Exceptions to the examiner's report were duly filed, on behalf of both AUT and the Conference, and, after further proceedings, the Board held that there was a violation of § 15 of the Act insofar as the action of June 12, 1952, was concerned, as that action constituted an agree-

[4] Section 7 of the Conference agreement provides that the Conference at any meeting may pass upon the "ordinary routine business of the Conference," and upon any matter involving, among other things, "brokerages."

[5] Section 4 of the Conference agreement provides: "No freight brokerage shall be paid in excess of one and one-quarter percent (1¼%) on the amount of freight paid in accordance with the tariff."

ment required to be filed for approval. The Board held, however, that notwithstanding this violation AUT could not collect brokerage, because to do so would violate § 16 of the Act in that the waiving of a freight forwarding fee from the consignee and the collection thereof from the carrier under the guise of brokerage would be an indirect rebate to the consignee to the extent that the brokerage payment included the cost of the freight forwarding services and was therefore an "unjust or unfair device or means." The Board also held that, apart from the indirect rebate, *brokerage* had not been earned. Brokerage, the Board held, has been defined as securing cargo for the ship.

The Board also announced in its Report and Decision that since it was desirable that a more definitive guide be established whereby Conferences may readily distinguish between routine agreements which need not be filed with the Board and those which require specific approval under § 15, a rule-making proceeding for the definition of status in such field would be initiated. It also ruled that in view of the want of clarity in prior Board decisions pertaining to both the requirement of filing of agreements under § 15 and the waiving of freight forwarding fees where brokerage is to be collected, it would not take any action against any of the parties aimed at the collection of penalties provided for in §§ 15 and 16 of the Act.

Thereupon, the present petition for review was filed by AUT, asking that the Board's order be set aside and that this court direct the Board to modify its order, or to enter a new order directing the payment of reparations to AUT in the full amount demanded by it. The Conference and its member companies have intervened.

We consider the question of whether the payment of so-called brokerage under the circumstances of this case

would have violated § 16 of the Act. The Board took the position that AUT performed no services as a broker but did perform freight forwarding services for the *consignee* without compensation therefor, intending, instead, to rely upon brokerage from the carriers for its compensation. The Board held that under this arrangement the consignee would have had property transported at less than the rate of the transportation therefor together with the cost of the incidental services in connection therewith. The Board also held that the waiving of a freight forwarding fee from the consignee and the collection thereof from the carrier under the guise of brokerage would be an indirect rebate to the consignee to the extent that the brokerage fee included the cost of the freight forwarding services, and therefore constituted an unjust or unfair device or means in violation of § 16, particularly as here there had been no brokerage services as such performed by AUT.

It is perfectly obvious that AUT performed no services as a broker in the ordinary sense of the term "broker," *i.e.*, securing cargo. Far from obtaining the cargo for the Conference, AUT was in direct conflict with the Conference, and under no stretch of the imagination could it be said that AUT earned any compensation whatsoever as a broker. AUT, however, contends that, under the rather broad meaning given to the word "broker" in previous cases, that term includes "freight forwarder." It is doubtless true that, where brokerage has been earned, the broker very frequently has performed freight forwarding services as well, and without additional compensation. In this case, however, except in a few minor details, the services rendered inured not to the benefit of the carrier but to the benefit of the consignee, and, to that extent the Board was correct in holding that the consignee benefited and that a rebate in effect resulted.

We have no reason to disagree with the Board's holding that, of all the services performed by AUT in connection with the shipments (arranging overland transportation to shipside, coordinating manufacturers' delivery dates with steamer sailings, procuring consular invoices, customs declarations and export permits, reserving space, booking the cargo, preparing bills of lading, and advising Central when to expect shipments), only the preparing of bills of lading might be construed to be the performance of an obligation which is that of a carrier, and that that duty on the carrier arises only after the shipper, or his agent, supplies the carrier with a complete description of the goods to be shipped.

It seems clear, as the Board held, that the other functions performed by AUT could not be said to be functions which, in the absence of AUT's performing them, would be performed by the carriers, and that the duty to bring the locomotives alongside the vessel ready for shipment is a duty of the shipper, not of the ship, and was ordinary freight forwarder service.

We believe that this determination by the Board was a matter committed to it as an expert in the field and that this court should not pit its view against that of the Board. The great complexity of our economy induced Congress to place the regulation of businesses like foreign shipments in specialized agencies with broad powers. The courts are slow to interfere with the conclusions of such agencies when reconcilable with statutory directions. See *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Unemployment Comm'n.* v. *Aragon*, 329 U.S. 143 (1946).

We think the conclusions of the Board in this case are reconcilable with the statutory directions. Certainly it is true that the Board should have authority to distinguish between the services of a broker and those of a

freight forwarder and find that, under the circumstances of this case, § 16 had been violated.

The appointment of AUT as a broker by Central could not create any liability on the part of the ocean carriers. There was no agreement by the carriers authorizing the appointment, and certainly no agreement by the members of the Conference to incur liability to AUT, with whom it had engaged in competition for the very business for which it now claims compensation by way of reparations. AUT was not the broker for the carriers to obtain the contract and there was no agreement, at any time between AUT and the members of the Conference to pay brokerage. Everything is to the contrary and AUT was promptly put on notice that the carriers would not pay. Nevertheless, having this notice, AUT elected to proceed. It did so at its own risk. It seems clear also that the selection of the carriers was made by Central and not AUT, as Central reserved the right to designate the carrier.

Even if it be true that the Conference has heretofore paid brokerage wherever the broker forwarder was "identified with the cargo," no reason exists why the Board, under its broad power, should not have authority to distinguish between the services of a broker and those of a freight forwarder.[6] We therefore hold that the Board

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[6] It seems perfectly clear, as held by both the examiner and the Board, that the action of the Conference at the June 12, 1952 meeting, without its submission to and approval by the Board, was a violation of § 15 of the Act. The Conference vote, it may plausibly be argued, reflected an agreement designed to punish AUT for its action in bidding against the Conference. The Conference members, prior to the June 12, 1952, meeting, had paid brokerage to forwarder-brokers where such persons had been merely "identified with the cargo," and the action of that date was obviously a modification of an existing agreement and required under § 15 to be filed with the Board for approval before becoming effective. See *Pacific Westbound Conference* v. *Local & Co.*, 269 P. 2d 541 (Ore. 1954).

committed no error in holding that no reparations were payable to AUT under the circumstances of this case.

Obviously, even in the case of a violation of § 15, injury must be shown before a recovery can be had; AUT having had no right to brokerage, it suffered no damage by the action complained of.

The above disposition of the case makes it unnecessary to reach the question of jurisdiction of the Board over shipments originating in Canada.

We are of opinion also that there is no merit in appellant's claim that the Board's decision and order are procedurally invalid. If the Board held, as it did, that the collection of brokerage, so-called, under the circumstances of this case, would violate § 16, the Board would not be precluded from disallowing compensation for an illegal act, whether the question was specifically raised or not. In addition, we are unable to say that the issue in question was not called to the attention of the Board.

The order of the Federal Maritime Board is

Affirmed

[Appendix omitted.]

Judgment

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1958.

No. 13,866

AMERICAN UNION TRANSPORT, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD,

Respondents.

On Petition to Review Order of the Federal Maritime Board.

Before: DANAHER, BASTIAN and BURGER, *Circuit Judges*.

JUDGMENT

This case came on to be heard on the record from the Federal Maritime Board, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the order of the said Federal Maritime Board on review in this case be, and it is hereby, affirmed.

Dated: Apr 24 1958

Per Circuit Judge BASTIAN.

Filed Apr 24 1958

JOSEPH D. STEWART
Clerk

APPENDIX B

(REPORT AND ORDER OF THE BOARD)

SERVED
Mar 27 1957
FEDERAL MARITIME BOARD

FEDERAL MARITIME BOARD

No. 758

AMERICAN UNION TRANSPORT, INC.

v.

RIVER PLATE & BRAZIL CONFERENCES
(And the Member Lines thereof)

Submitted January 30, 1957 Decided March 25, 1957

Respondents found to have violated provisions of section 15 of the Shipping Act, 1916, as amended, in failing to file with the Board for approval and in effectuating an agreement prohibiting the payment of brokerage on locomotives shipped from New York, N. Y. to Rio de Janeiro, Brazil.

Complainant found not entitled to reparations as brokerage was not earned by complainant, and such payment would result in an indirect rebate to the consignee in violation of section 16 of the Shipping Act, 1916, as amended.

GEORGE F. GALLAND and WILLIAM J. LIPPMAN for complainant.

ELMER C. MADDY and GEORGE F. FOLEY, for respondents.

Report of the Board

(Clarence G. Morse, Chairman, Ben H. Guill, Vice Chairman, Thomas E. Stakem, Jr., Member)

This case arises out of a complaint filed under section 22 of the Shipping Act, 1916, as amended, (the Act), by American Union Transport, Inc. (herein "AUT"), against River Plate & Brazil Conference and the member lines thereof[1] (herein the "Conference"), alleging that the Conference adopted an agreement on June 12, 1952, neither filed with, nor approved by, the Board in violation of section 15[2] of the Act, pursuant to which brokerage otherwise earned by AUT was withheld by the Conference. Reparations in the amount of brokerage withheld are demanded by AUT. The Conference contends that it did not violate section 15 of the Act, as alleged, that the payment of brokerage here would have resulted in a violation of section 16 of the Act, that brokerage was not, in fact,

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[1] The Booth Steamship Company, Limited; Brodin Line (Joint Service of Rederiaktiebolaget Disa; Rederiaktiebolaget Poseidon; Angfartygsaktiebolaget Tirfing); Cia. Argentina de Navegacion Dodero, A. A.; Dampskibsselskabet Torm (Torm Line); Flota Mercante Del Estado; Holland Interamerica Line (Joint Service of N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij "Holland-Amerika Lijn"; Van Nievelt, Goudriaan & Co's Stoomvaart Maatschappij N. V.; International Freighting Corporation, Inc. (I. F. C. Lines); Ivaran Lines (Joint Service of A S Lise; Aktieselskapet Ivarans Rederi; A. S. Besco; Skibsaktieselskapet Igadi); Lamport & Holt Line, Ltd.; Lloyd Brasileiro (Patrimonio Nacional); Mississippi Shipping Company, Inc. (Delta Line); Moore-McCormack Lines, Inc. (American Republics Line); The Northern Pan-America Line, A/S; Norton Line (Joint Service of Rederiaktiebolaget Svenska Lloyd; Stockholms Rederiaktiebolaget Svea; Rederiaktiebolaget Fredrika; Southern Cross Line (Joint Service of A/S J. Ludwig Mowinckels Rederi; Westfal-Larsen & Co., A/S).

[2] Section 15 (46 U. S. C. A. 814), is attached. [See Appendix C.]

earned, and that AUT had directly competed with the Respondent for the very business upon which it now demands brokerage thereby negating any claim which AUT may have had for the brokerage.

This same controversy was initiated as an anti-trust suit in the United States District Court for the Southern District of New York. It was there dismissed on the ground that this Board had primary exclusive jurisdiction, *American Union Transport, Inc. v. River Plate & Brazil Conferences*, 126 F. Supp. 91 (1954), and the dismissal was affirmed by the United States Court of Appeals, 222 F. 2d 369, (C. C. A. 2d 1955).

Hearings were held before an examiner who served his Recommended Decision on October 25, 1956. Exceptions were filed by AUT and the Conference, and oral argument was made to the Board thereon on January 30, 1957.

The Facts

AUT is a registered freight forwarder, a broker, owner and charterer of vessels, and a water carrier. The Conference, a group of steamship lines, are common carriers by water between ports of the United States and Canada (save the Pacific coast of the United States and Canada, and Newfoundland) and ports in Uruguay, Paraguay, Argentina and Brazil.

The Conference operates pursuant to Agreement No. 59, on file with, and approved by, the Board. This agreement provides in part:

> "4. No freight brokerage shall be paid in excess of one and one quarter percent (1¼%) on the amount of freight paid in accordance with the tariff.
>
> . . . . .
>
> 7. The members of each Conference, . . . shall, at any meeting of the Conference, consider and pass upon

> the ordinary routine business of the Conference, and upon any matter involving discriminations, tariffs, freights, commissions, brokerages . . . governing south bound transportation . . ."

and Rule 10 of Respondent's Tariff No. 11 provides:

> "*Brokerage*:
>
> Freight brokerage . . . may be allowed only to bona fide brokers whose actual business shall be brokerage and freight between ocean carriers and the general shipping public, . . . freight brokerage shall be paid only on the following understanding which shall be written or stamped on all brokerage bills:
>
> > "In compliance with Section 16 of the Shipping Act, 1916, payment by the carrier and acceptance of freight brokerage by the broker are on the strict understanding that no part of the brokerage shall revert to the shipper or consignee, and that the business of the broker is in no sense subsidiary to *that of the shipper or consignee* . . ."

The Estrado de Ferro Central do Brazil (herein "Central"), an instrumentality of the Government of Brazil, purchased 120 locomotives and spare parts therefor from the Baldwin-Lima-Hamilton Corporation, the International General Electric Company, and the Montreal Locomotive Works, Ltd. The general agent of Lloyd Brasileiro (herein "Lloyd"), a member of the Conference and a Respondent herein, another instrumentality of the Brazilian Government, acted as Central's fiscal agent in the transaction. Upon learning of the purchase, both AUT and the Conference attempted to secure the business of transporting the locomotives. Each was aware that the other was competing for the business but neither was aware of the rates quoted by the other. The rates offered by the Conference were accepted by Central.

On May 7, 1952, the Conference quoted rates to Central, applicable only where "(1)he Conference will receive the

contract for transportation of the total of 120 locomotives."[3] On May 13, 1952, Lloyd advised Central it would "undertake transportation of the locomotives purchased by your railroad . . . in accordance with the . . . [offer] laid down in the letter of 7th inst. from the same Conference." On May 14, 1952, Lloyd was "entrusted with the transportation of the 120 Diesel-electric locomotives . . . at the freight rates submitted in the letter of the Freight Conference . . . ." This letter also advised Lloyd that Central (the consignee) had decided to appoint AUT as "its broker" in charge of arranging the shipments.

On May 16, 1952, Central advised AUT that it had decided "to entrust Ocean Transportation of the 120 diesel electric locomotives under construction in the States and Canada for the Central to Lloyd Brasileiro as members of the Freight Conference and at the price quoted to this railroad in a letter of seventh instant by the Conference. *Likewise it was decided to appoint American Union Transport Inc.*, as broker in charge of negotiation and arrangement in connection with the shipments by Lloyd Brasileiro or another member of the Conference, without any charge to Central."

Thus all the locomotives were to move via Conference vessels pursuant to the understanding between Central and the Conference, and all arrangements for their shipment were to be handled by AUT without any charge to Central therefor, pursuant to the understanding between Central and AUT.

Subsequent to the letters above mentioned but prior to the time any of the locomotives were shipped, the Conference, at a Special Joint Executive Meeting on June 12, 1952, considered whether or not brokerage should be paid on the locomotives, and in view of the fact that AUT had

[3] No mention is made therein as to the spare parts.

competed with the Conference for this business, and since the business was closed with Central by the Conference directly, concluded that no brokerage would be payable to AUT on these locomotives. This action[4] dated June 12, 1952, was not filed with the Board for approval.

AUT was not advised of this Conference action until its bills for brokerage to Moore-McCormack Lines were returned to AUT, unpaid, on October 14, 1952, with the explanation that the line could not pay it due to the Conference action of June 12, 1952. AUT protested the action to the Conference Chairman who replied that the

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[4] On June 11, 1952, the Conference Chairman advised all members:

> "A Special Joint Executive meeting of the Conference is called for 2:30 P.M., THURSDAY, June 12th to determine whether or not Brokerage shall be paid to American Union Transport Company, subsidiary, or associated companies on the 120 Locomotives closed in Rio with the Central Railroad of Brazil for which, we are informed, the American Union Transport now has been appointed freight forwarder.'
>
> "In view of the fact that the American Union Transport Company and/or its associates negotiated for these locomotives as a competitor carrier, underquoting existing Conference rates, forcing the Conference to markedly reduce its rates to secure this business, it is believed by several lines that even though they have been appointed freight forwarders by the Central Railroad of Brazil, they are performing no service whatsoever for our member lines and therefore are not entitled to brokerage."

The minutes of this meeting as signed by the Chairman reveal:

> "The Chair advised this meeting had been called to consider whether or not brokerage should be paid on the 120 Locomotives closed for account of Conference members by direct negotiation of Conference representatives with the Central Railroad of Brazil.
>
> "After discussion it was proposed that no brokerage be paid on the 120 Locomotives closed direct in Brazil with the Central Railroad of Brazil by Conference representatives, and on ballot vote the proposal was approved.
>
> "On motion, seconded and carried, the meeting thereupon adjourned."

record failed to show that AUT rendered any services to merit brokerage.

All the locomotives which were shipped out of New York moved via Lloyd vessels and the shipments out of Montreal, Canada, were carried by Moore-McCormack Lines, Lamport-Holt, Inc., and International Freighting Corporation, all Conference members.

Central purchased spare parts for the locomotives from the manufacturers which were shipped along with the locomotives. Brokerage on these spare parts was paid by the lines in some, but not all, instances.

Pursuant to its understanding with Central, AUT as freight forwarder coordinated the manufacturer's delivery dates with the Conference's sailing schedules, supervised overland transportation from the manufacturer to the carrier, reserved space, made actual bookings, prepared bills of lading, documented shipments for export, arranged for certification of consular invoices, delayed overland transportation where necessary to avoid railroad demurrage, and prepared export declarations.

In accordance with the directions of Central, AUT booked all of the locomotives which moved out of New York on Lloyd vessels. On the Montreal shipments, AUT advised Central of the availability of vessels, but the record fails to show that in any instance the actual designation of a carrier was made by AUT; on the contrary, it is clear that Central reserved to itself the right to designate the vessel.[5]

The record clearly establishes that the Respondents have been content in the past to pay brokerage wherever the forwarder-broker was merely "identified with the cargo."

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[5] By letter of August 5, 1952, Central advised AUT that in the event Lloyd had no vessel available, AUT was to advise Central of available Conference vessels after which "a reply will be promptly sent to you, authorizing or not the shipment on the reported vessel; . . ."

Findings and Recommendations of the Examiner

The examiner concluded that (1) the June 12, 1952, action of the Conference was an agreement within the meaning of section 15 of the Act, which was not filed with nor approved by the Board, and that in executing the terms of the agreement, the Conference violated section 15 of the Act; (2) AUT earned brokerage on the locomotives and parts shipped out of New York; (3) that the refusal of Lloyd to pay brokerage was not in the exercise of its own managerial discretion; and (4) the transportation of the locomotives and spare parts from Montreal to Rio de Janeiro was not within the Board's jurisdiction.

The examiner also recommended that the Board order the Conference to pay AUT reparations in the amount of $7,330.41, with interest, and that the fact of violation of section 15 be referred to the Department of Justice for appropriate action.

Exceptions

AUT excepted to the examiner's conclusion that the Board was without jurisdiction as to the shipments originating in Montreal on the ground that the Conference's basic agreement, as approved, pertained to Canadian as well as United States ports, and further, that the wrongful act—the effectuation of the unfiled section 15 agreement—occurred within the jurisdiction of the Board and only the damages flowing therefrom occurred in Canada. AUT also claims that both the Board and Respondents are estopped from asserting that we have no jurisdiction over the Canadian shipments in view of the positions

taken by the Board and the Conference when this matter was argued before the Courts.[6]

Respondents contend that (1) their action of June 12, 1952, was within the scope of their approved basic agreement, (2) AUT forfeited any right to brokerage by acting contrary to the best interests of the Conference when it competed, as a carrier, with the Conference for the business in the first instance, and (3) AUT is not entitled to brokerage on the carryings made by Lloyd because in refusing to pay the brokerage, Lloyd was merely exercising its own independent managerial discretion.

Discussion and Conclusions

We first inquire whether the Conference action of June 12, 1952 constituted an agreement, or a modification of an agreement, required to be filed with the Board for approval prior to its effectuation under section 15 of the Act, or whether it was merely a routine action taken within the scope of the basic agreement. While it is true that the Conference's Tariff Rule permits the member lines to pay brokerage—when earned—at their discretion, historically the Respondents have been paying brokerage to forwarder-brokers where such person has merely been "identified with the cargo." The Conference action of June 12 thus amounted to a new course of conduct for its members in relation to the payment of brokerage, i. e., it prohibited the payment of brokerage regarding specified shipments. It represents therefore a modification of an existing agreement which, because it was

[6] Both the Board and Respondents there argued that the matters set forth in the complaint were within the exclusive primary jurisdiction of the Board, but the complaint merely alleged that the locomotives were "shipped from North Atlantic ports to Brazil" and there was nothing before the Court to indicate that any of the shipments originated in Canada.

calculated to control, regulate, prevent, or destroy competition, and provided for an exclusive, preferential or cooperative working arrangement, was required to be filed under section 15 of the Act with the Board for approval prior to its effectuation.

Although we indicated in *Agreements and Practices re Brokerage*,[7] 3 U. S. M. C. 170 (1949), (herein Docket No. 657), that we would not object to the establishment by Conferences of reasonable rules and regulations preventing the payment of brokerage which would be in violation of the Act, we neither intended to grant, nor could we grant, advance approval of a rule or regulation concerning the payment of brokerage directed solely at one forwarder-broker or particular shipment. Had the Conference action of June 12, 1952, been one of general and prospective applicability and by its terms designed to prohibit the payment of brokerage which would be in violation of the Act, it would have fallen within the meaning of our language in Docket No. 657, but that issue is not presented here. We note that the approved basic agreement authorized Respondents to "consider and pass upon . . . any matter involving . . . brokerages." Approval of that language did not constitute a "cover of authority" under which any future agreements by Respondents concerning brokerage were given prior approval. Compare *Isbrandtsen v. United States*, 211 F. 2d 51 (1954).

Since this action did constitute an agreement or a modification of an agreement, required to be filed for approval and since it was not filed and was effectuated by the Respondents, section 15 of the Act was violated.

[7] "Nor is anything herein to be construed as a prohibition against carriers, acting under a conference agreement, from establishing all reasonable rules and regulations which will prevent the payment of brokerage under circumstances which would violate the Act, or as a prohibition on the amounts which they may pay."

In *Pacific Westbound Conference et al. v. Leval & Co., Inc.*, 269 P. 2d 541 (1954) the Supreme Court of Oregon said:

> "Section 814 of Title 46 U. S. C. A., [section 15 of the Act], hereinbefore set out, provides that the term 'agreement' as used in the Act includes 'understandings' and 'other arrangements', and that all agreements, modifications or cancellations made subsequent to the organization of the Commission under the Act *shall be lawful only when approved by the Commission and that it shall be unlawful directly or indirectly, to carry out any agreement or understanding or practice until approved.*" (Italics in original.)

See also *Isbrandtsen v. U. S., supra* and *River Plate and Brazil Conference, et al. v. Pressed Steel Car Company, Inc.*, 124 F. Supp. 99 (1954). Whether or not we would approve a similar agreement if it had general, prospective application we need not here decide.

We next consider whether the payment of brokerage to AUT by the Conference would have been in violation of section 16 of the Act.[8] As we have seen, AUT performed freight forwarding services for the consignee without compensation therefor and relied upon brokerage from the carriers for its full compensation, i. e., for its services as a freight forwarder and for its services, if any, as a broker. Under this arrangement the consignee was to have property transported at less than the rate of the transportation therefor, together with the cost of the incidental services in connection therewith. This is the evil which Congress had in mind when it stated that it shall be "unlawful for any . . . consignee, forwarder, broker . . . knowingly and willfully, directly or indirectly, . . . by any . . . unjust or unfair device or means to obtain or attempt to obtain transportation by

[8] Section 16 of the Act (46 U. S. C. A. 815) is attached. [See Appendix C.]

water for property at less than rates or charges which would otherwise be applicable."[9] The waiving of a freight forwarding fee from the consignee and the collection thereof from the carrier under the guise of brokerage would be an indirect rebate to the consignee to the extent that the brokerage payment included the cost of the freight forwarding services and therefore an "unjust or unfair device or means."

Since on this record it is clear that AUT performed services for Central gratis, and expected compensation therefor from the carriers in the nature of brokerage payments, the payment of such brokerage to AUT would have resulted in an indirect rebate to Central, which we could not permit. Even if brokerage was otherwise recoverable we would not order it paid where such payment would countenance a violation of section 16 of the Act and thus be illegal. In *Keogh* v. *C. & N. W. Ry. Co.*, 260 U. S. 156 (1922), the Supreme Court denied the award of treble damages to a shipper on the theory that such an award "might, like a rebate, operate to give him a preference over his competitors." See also *Terminal Warehouse Co.* v. *Penna. R. Co.*, 297 U. S. 511 (1935). The fact that the consignee here was a government agency has no bearing on the issue. We find nothing in the Shipping Act which exempts from the provisions of section 16 any designated shipper or class of shippers. Although the provisions of section 16 prohibit the payment of brokerage in this case, brokerage could not be recovered here, section 16 notwithstanding, simply because brokerage was not earned. Brokerage has been defined as securing cargo for the ship. *Agreement No. 7790*, 2 U. S. M. C. 775 (1946). Clearly, on this record, AUT did not secure the cargo for the ship. On the con-

[9] Section 16 of the Act (46 U. S. C. A. 815) is attached. [See Appendix G.]

trary, it is apparent that the transportation was sold directly by the Conference to Central, and that Central reserved to itself the right to select the individual carrier in every instance. Of all the services performed by AUT in connection with these shipments—arranging overland transportation to shipside, coordinating manufacturer's delivery dates with steamer sailings, procuring consular invoices, customs declarations and export permits, reserving space, booking the cargo, preparing bills of lading, and advising Central when to expect shipments—only the preparing of bills of lading may be construed to be the performance of a duty which is the carrier's, and that duty on the carrier arises only after the shipper, or his agent, supplies the carrier with a complete description of the goods to be shipped. The other functions performed by Complainant cannot be said to be functions which, in the absence of AUT's performing them, would be performed by the carriers. The duty to bring the locomotives alongside the vessel, ready for shipment, is a duty of the shipper, not the ship. They were ordinary freight forwarder services. We must conclude therefore, that brokerage was not earned by AUT with regard to any of these locomotives.

However, as we stated in *Agreement and Practices Pertaining to Brokerage—Pacific Coast European Conference*, Docket No. 767, November 30, 1955, since it is desirable that a more definitive guide be established whereby Conferences may readily distinguish between routine agreements which need not be filed with the Board and those which require specific approval under section 15, a rule-making proceeding for the definition of such agreement will be initiated.[3]

In view of the want of clarity in prior Board decisions pertaining to both the requirement of filing of agreements

under section 15 and the waiving of freight forwarding fees where brokerage is to be collected, we shall not take any action against any of the parties herein aimed at the collection of penalties provided for in section 15 and 16 of the Act.

As to AUT's claim for reparations in the amount of brokerage withheld by the Respondents on the spare parts, without considering whether section 16 would prohibit an award, we find and conclude that AUT has failed to prove that it is entitled to such payment by reason of having secured such cargoes for the vessels.

In view of the foregoing we find it unnecessary to discuss Respondent's contention that AUT forfeited any claim it may have had to brokerage by competing with the Conference initially contrary to the Conference's best interest.

Although what we have said above obviates decision or comment on the contention of complainant that we are now estopped from declaring that we have no jurisdiction over shipments originating in Canada destined for South America, we wish to point out that this agency's jurisdiction is as set out in statute, and we cannot, by our own act or omission, enlarge, or divest ourselves of, that statutory jurisdiction.

Other contentions and arguments advanced by the parties have been considered but have not been specifically mentioned as they do not affect the foregoing conclusion.

An appropriate order will be entered.

By the Board.

/s/ JAMES L. PIMPER
James L. Pimper
Secretary

[Appendix Omitted]

Order of the Board

(SERVED)
(March 28, 1957)
(FEDERAL MARITIME BOARD)

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 25th day of March A. D. 1957.

No. 758

AMERICAN UNION TRANSPORT, INC.

v.

RIVER PLATE & BRAZIL CONFERENCES
(And the Member Lines thereof).

These matters being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Board having made and entered of record its report, which report is hereby referred to and made a part hereof:

It is ordered, That respondents River Plate & Brazil Conferences and the member lines thereof be, and they are

hereby, notified and required to hereafter abstain from concerted action herein found to be in violation of section 15 of the Shipping Act, 1916, as amended;

It is further ordered, That the request of American Union Transport, Inc. for the award of reparations be, and it is hereby, denied; and

It is further ordered, That these proceedings be, and they are hereby, discontinued.

By the Board.

/s/ JAMES L. PIMPER
James L. Pimper
Secretary

APPENDIX C

STATUTES INVOLVED

Shipping Act.

Section 15 (46 U. S. C. 814):

That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", and amendments and acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

Section 16 (46 U. S. C. 815):

That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.

* * * * *

Section 22 (46 U. S. C. 821):

That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby.

The board shall furnish a copy of the complaint to such carrier or other person, who shall within a reasonable time specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this Act.